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# In the Supreme Court of the United States

OCTOBER TERM, 1983

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GEORGE C. WALLACE, GOVERNOR OF THE STATE OF ALABAMA, ET AL., APPELLANTS

*v.*

ISHMAEL JAFFREE, ET AL.

---

DOUGLAS T. SMITH, ET AL., APPELLANTS

*v.*

ISHMAEL JAFFREE, ET AL.

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*ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS

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## QUESTION PRESENTED

Whether a state statute that authorizes public school teachers to commence the school day by having their classes observe a moment of silence, during which students may engage in silent meditation or voluntary prayer, violates the Establishment Clause of the First Amendment.

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS

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### INTEREST OF THE UNITED STATES

The State of Alabama, like some 23 other states, has authorized a moment of silence in the public schools to enable students to engage in silent meditation and voluntary prayer. The court below held this practice unconstitutional under the First Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment. The United States has a substantial interest in this matter, which raises the question whether the Constitution prohibits neutral and noncoercive means

of accommodating private religious practices in the public schools and, by extension, in other public contexts. Among federal government activities potentially implicated by a prohibition on governmental accommodation of religion are the grant of tax preferences for religious institutions, the allowance of religious holidays to federal employees, and the enforcement of the religious accommodation requirements of Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. V) 2000e *et seq.*

In addition, the United States is authorized to operate schools for military and foreign service dependents under certain circumstances (10 U.S.C. 7204 (Navy); 20 U.S.C. 241 (federal property); 20 U.S.C. 926 (Defense Department); 22 U.S.C. 2701 (foreign service)) and schools for Indians (25 U.S.C. 271-304b). The resolution of this case will bear on Congress's authority to allow periods for silent prayer or meditation in such schools.

The United States has participated as a party or as amicus curiae in numerous cases arising under the Religion Clauses of the First Amendment. See, *e.g.*, briefs filed by the United States as amicus curiae in *Estate of Thornton* v. *Caldor, Inc.*, cert. granted, No. 83-1158 (Mar. 5, 1984); *School District of Grand Rapids* v. *Ball*, cert. granted, No. 83-990 (Feb. 27, 1984); *Lynch* v. *Donnelly*, No. 82-1256 (Mar. 5, 1984); *Marsh* v. *Chambers*, No. 82-23 (July 5, 1983); *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772 (1981); *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977); *Sloan* v. *Lemon*, 413 U.S. 825 (1973); *Roemer* v. *Board of Public Works*, 426 U.S. 736 (1976); and *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), and briefs filed as a party in *United States* v. *Lee*, 455 U.S. 252 (1982), and *Tilton* v. *Richardson*, 403 U.S. 672 (1971).

## STATEMENT

1. Appellee Ishmael Jaffree, an agnostic, filed this suit in the United States District Court for the Southern District of Alabama on behalf of three of his children who

attend Mobile County, Alabama public schools. In his original complaint, he challenged the practices of certain teachers who, at their own initiative, conducted prayers with students during school hours. Subsequently, appellee amended his complaint to join as defendants the Governor of Alabama, the state Attorney General, and several state education officials, and to challenge the constitutionality of two state statutes: Ala. Code § 16-1-20.1 (Supp. 1982), which authorizes teachers to institute a brief period of silence ("not to exceed one minute") for meditation or voluntary prayer at the commencement of the first class period,[1] and a separate, independent state statute, passed after initiation of the lawsuit, that would have permitted recitation of a state-composed prayer at the beginning of any homeroom or class period.[2] A group of parents in-

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[1] Ala. Code § 16-1-20.1 (Supp. 1982) provides that:

> At the commencement of the first class of each day in all grades in all public schools, the teacher in charge of the room in which each class is held may announce that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in.

This provision became effective on April 29, 1981. A separate provision, Ala. Code § 16-1-20, not involved in this case, also provides for a moment of silence in Alabama public schools. That statute differs from the provision at issue here in three respects: it applies only to grades one through six, it requires (rather than permits) teachers to conduct the moment of silence, and it refers to "meditation" alone. The judgment of the court of appeals did not directly pertain to Ala. Code § 16-1-20, and the latter is not at issue here.

[2] The statute, Ala. Code § 16-1-20.2, provided that:

> From henceforth, any teacher or professor in any public educational institution within the state of Alabama, recognizing that the Lord God is one, at the beginning of any homeroom or any class, may pray, may lead willing students in prayer, or may lead the willing students in the following prayer to God:
>
> Almighty God, You alone are our God. We acknowledge You as the Creator and Supreme Judge of the world. May

tervened to support both spoken prayer and the moment of silence. Spoken prayer, rather than the moment of silence, was the main focus of litigation in the lower courts.

The district court issued a preliminary injunction barring implementation of both statutes (J.S. App. 64d-75d). For trial on the merits, the court severed appellee's claim challenging teacher-initiated prayer from his claim challenging the state statutes. Thereafter the court concluded that "the establishment clause of the first amendment to the United States Constitution does not bar the states from establishing a religion" (J.S. App. 59d). It therefore dismissed the challenge both to teacher-initiated prayer (*Jaffree* v. *Board of School Commissioners of Mobile County*, 554 F. Supp. 1104 (J.S. App. 1d-55d)) and to the Alabama statutes (*Jaffree* v. *James*, 544 F. Supp. 727 (J.S. App. 56d-61d)) for failure to state a claim upon which relief can be granted (J.S. App. 53d, 59d).[3]

2. Appellee Jaffree appealed to the Eleventh Circuit, and Justice Powell, as Circuit Justice, issued an order granting a stay of the district court's order and reinstating the injunction pending final disposition of the appeal (J.S. App. 2e-5e).

The court of appeals reversed the dismissal of each of appellee's claims and remanded the case for entry of an order enjoining implementation of the statutes and teacher-initiated prayers. *Jaffree* v. *Wallace*, 705 F.2d 1526 (J.S. App. 1a-20a). The court concluded (J.S. App. 7a-12a) that the district court's interpretation of the

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Your justice, Your truth, and Your peace abound this day in the hearts of our countrymen, in the counsels of our government, in the sanctity of our homes and in the classrooms of our schools in the name of our Lord. Amen.

This provision was enacted on July 8, 1982, some 14 months after the moment of silence statute became effective.

[3] The district court accordingly dissolved the preliminary injunction (J.S. App. 59d).

First Amendment is contrary to cases decided by this Court, including *Everson* v. *Board of Education*, 330 U.S. 1 (1947); *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203 (1948); *Abington School District* v. *Schempp*, 374 U.S. 203 (1963); and *Engel* v. *Vitale*, 370 U.S. 421, 429-430 (1962). In one paragraph of its 20-page opinion (J.S. App. 18a), the court of appeals held the moment of silence statute unconstitutional because its objective was "the advancement of religion." The court stated: "We do not imply that simple meditation or silence is barred from the public schools; we hold that the state cannot participate in the advancement of religious activities through any guise, including teacher-led meditation. It is not the activity itself that concerns us; it is the purpose of the activity." J.S. App. 18a.[4]

The court of appeals denied a petition for rehearing and rehearing en banc (J.S. App. 1b-2b). Four judges dissented from the denial of rehearing en banc insofar as the decision invalidated Alabama's moment of silence statute (*id.* at 2b-4b). The dissenting judges observed first that the significance of the decision "transcends one state and one statute," because many states have enacted similar laws (*id.* at 2b-3b). Second, the dissenting judges noted that the constitutionality of observing moments of silence in the public schools had not been resolved by this Court, and that other courts had reached conflicting decisions (*id.* at 3b). Finally, the dissenting judges expressed "some doubt as to the correctness of the panel opinion" (*ibid.*), citing extensive schol-

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[4] Because the district court viewed the Establishment Clause as not applicable to the states (J.S. App. 59d), it did not make factual findings with respect to the purposes or consequences of the statutes in question, nor did it separately analyze the statutes. The court of appeals rejected the district court's interpretation of the reach of the Establishment Clause (J.S. App. 10a-11a), but did not remand for a separate inquiry on the administration of the moment of silence statute. Instead, it held the moment of silence statute invalid on its face. *Id.* at 18a.

arly and judicial authority in support of the constitutionality of moment of silence provisions (*id.* at 3b-4b). The judges concluded that, however the issue might be resolved by the en banc court, "it is important and sufficiently unsettled to command its attention" (*id.* at 4b).

3. The State and the intervenors appealed to this Court with respect to both state statutes, and the School Board filed a petition for a writ of certiorari with respect to the statutes and the teacher-initiated prayers. This Court summarily affirmed the judgment of the court of appeals invalidating the state-composed prayer statute, denied the petition for certiorari, and noted probable jurisdiction to review the decision striking down the moment of silence statute.

## SUMMARY OF ARGUMENT

In 1962, this Court held that a state may not direct or permit public school teachers to lead their students in recitations of a prayer. *Engel* v. *Vitale*, 370 U.S. 421. Since that time, Alabama and some 23 other states have enacted statutes authorizing or requiring daily moments of silence in the public schools.[5] At least until recently, these provisions have generally been thought to be constitutional. *Abington School District* v. *Schempp*, 374 U.S.

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[5] In addition to Ala. Code § 16-1-20.1 (Supp. 1982), see Ariz. Rev. Stat. Ann. § 15-522 (Supp. 1983); Ark. Stat. Ann. § 80-1607.1 (1980); Conn. Gen. Stat. Ann. § 10-16a (West 1981); 61 Del. Laws ch. 547 (1978) (as interpreted in Op. Att'y Gen. 79-I 011 (1979)); Fla. Stat. Ann. § 233.062 (West Supp. 1983); Ga. Code Ann. § 20-2-1050 (1982); Ill. Rev. Stat. ch. 122, ¶ 771 (Supp. 1983); Ind. Code Ann. § 20-10.1-7-11 (Burns Supp. 1983); Kan. Stat. Ann. § 72.5308a (1980); La. Rev. Stat. Ann. § 17:2115 (West 1982); Me. Rev. Stat. Ann. tit. 20-A, § 4805 (1982); Md. Educ. Code Ann. § 7-104 (1978); Mass. Ann. Laws ch. 71, § 1A (Michie/Law. Co-op. Supp. 1983); Mich. Comp. Laws § 380.1565 (1979); N.J. Rev. Stat. § 18A:36-4 (Supp. 1983); N.M. Stat. Ann. § 22-5-4.1 (1981); N.Y. Educ. Law § 3029-a (McKinney 1981); N.D. Cent. Code § 15-47-30.1 (1981); Ohio Rev. Code Ann. § 3313.601 (Page 1980); Pa. Stat. Ann. tit. 24, § 15.1516.1 (Purdon Supp. 1983); R.I. Gen. Laws § 16-12-3.1 (1981); Tenn. Code Ann. § 49-1922 (Supp. 1982); Va. Code § 22.1-203 (1980).

203, 281 (1963) (Brennan, J., concurring) (footnote omitted) ("the observance of a moment of reverent silence at the opening of class" might be considered a "nonreligious means" of serving "solely secular purposes * * * without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and government"); *Gaines* v. *Anderson*, 421 F. Supp. 337 (D. Mass. 1976) (three judge court); *Opinion of the Justices*, 113 N.H. 297, 301, 307 A.2d 558, 560 (1973).[6] In the last two years, however, three district courts, in addition to the court of appeals below, have held that such provisions violate the Establishment Clause. *May* v. *Cooperman*, 572 F. Supp. 1561 (D. N.J. 1983); *Duffy* v. *Las Cruces Public Schools*, 557 F. Supp. 1013 (D. N.M. 1983); *Beck* v. *McElrath*, 548 F. Supp. 1161 (M.D. Tenn. 1982).

We believe that provision for a moment of silence in the public schools is not an establishment of religion, but rather a legitimate way for the government to provide an opportunity for both religious and nonreligious introspection in a setting where, experience has shown, many desire it. It is an instrument of toleration and pluralism, not of coercion or indoctrination.

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[6] The weight of scholarly authority also favors the moment of silence. See, *e.g.*, L. Tribe, *American Constitutional Law* § 14-6, at 829 (1978); P. Freund, *The Legal Issue, in Religion in the Public Schools* 23 (1965); Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 Minn. L. Rev. 329, 371 (1963); Kauper, *Prayer, Public Schools and the Supreme Court*, 61 Mich. L. Rev. 1031, 1041 (1963); Comment, *Accommodating Religion in the Public Schools*, 59 Neb. L. Rev. 425, 450-454 (1980); Note, *Religion and the Public Schools*, 20 Vand. L. Rev. 1078, 1092-1093 (1967). But see, *e.g.*, Drakeman, *Prayer in the Schools: Is New Jersey's Moment of Silence Law Constitutional?*, 35 Rutgers L. Rev. 341 (1983); Note, *The Unconstitutionality of State Statutes Authorizing Moments of Silence in the Public Schools*, 96 Harv. L. Rev. 1874 (1983) [hereinafter cited as Harvard Note]; Note, *Daily Moments of Silence in Public Schools: A Constitutional Analysis*, 58 N.Y.U.L. Rev. 364 (1983) [hereinafter cited as NYU Note].

A. The moment of silence is constitutional for the same reasons the released time program in *Zorach* v. *Clauson*, 343 U.S. 306 (1952), was constitutional. Whether the moment of silence is used for prayer or for other contemplative activity is purely a matter of voluntary choice. The moment of silence is perfectly neutral with respect to religious practice: it neither favors one religion over another nor conveys endorsement of religion. It occasions no interference by the government in the affairs of religious institutions. Indeed, from the perspective of the Establishment Clause, the moment of silence is less problematic than the *Zorach* released time program.

B. The cursory analysis employed by the court below is deficient in that it does not distinguish between government efforts to sponsor (or "establish") a religion and government efforts to accommodate the voluntary practice of religion. The court's wooden application of the three-part test of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), reflects this deficiency: under it *all* government actions that have the purpose or effect of facilitating or accommodating religious observance would be invalid. Numerous holdings of this Court make it clear that the Religion Clauses do not invalidate governmental acts whose purpose and effect is to facilitate opportunities for voluntary religious practice.

C. Certain other objections have been raised to moment of silence provisions. They have been thought unnecessary (since students are free to engage in silent prayer during other school activities); they have been thought susceptible to unconstitutional administration; they have been thought coercive in requiring students who do not wish to pray to remain silent. These are not, in our view, objections of a constitutional dimension; they certainly do not justify facial invalidation of the statutes of Alabama and some 23 other states.

D. Perhaps most fundamentally, the moment of silence has been opposed because it is inconsistent with a view of the Establishment Clause which would require the absolute elimination of religious elements from our public

schools and public life. That view, however, has been consistently rejected by this Court. The purpose of the Establishment Clause is not to work an artificial secularization upon our public life and institutions, but to ensure that the force of government is not brought to bear to induce or to restrain voluntary religious exercise (or nonexercise). The moment of silence, we submit, is fully consistent with that purpose.

## ARGUMENT

### A MOMENT OF SILENCE FOR MEDITATION OR PRAYER IN THE PUBLIC SCHOOLS DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

In 1962, this Court held that the First Amendment, as applied to the states through the Fourteenth Amendment, prohibits the states from directing or permitting public school teachers to lead their classes in the recitation of a prayer. *Engel* v. *Vitale*, 370 U.S. 421. If anything has become clear during the more than 20 years of public controversy that has ensued, it is that opinions on the question of the proper role of religious observance in the public schools vary dramatically and are passionately held. Many persons feel, with intense sincerity, that the everyday world of work or study ought to include at least a moment during which individuals have an opportunity to acknowledge a transcendent element in their lives. This need is felt most acutely by persons of religious faith who believe that prayer should be an integral part of all of life's activities, including school, and that the state in its role as enforcer of compulsory education laws and provider of universal public education should be ready to accommodate this belief. The practice of opening the school day with spoken prayer and scriptural reading was responsive to these feelings; when this practice was declared unconstitutional, it was perceived by many as a rebuff to fundamental aspirations.

On the other hand, in ruling these practices invalid the Court was responding to other concerns that are also deep and intense. Many persons feel that the recitation of prayers and scriptures in school is an invasion of their right to control their, or their children's, religious life. They believe that there is no way to ensure the truly voluntary character of prayer in this context—that impressionable young people will feel pressure to engage in religious observances in which they do not believe. There is also the concern that decisions about what prayer to recite, what scripture to read, will create the appearance of an official endorsement of one faith, to the disadvantage of adherents of minority faiths or of no religion at all.

Evidently one way to meet these latter concerns is to eliminate all opportunity for devotional practices at school. Students can pray, if they want to pray, at home, or if they can find a suitable occasion during snatches of inactivity in the school day. We do not doubt that this approach is constitutional; it is unlikely that in most contexts a strong Free Exercise claim could be made that time for personal prayer must be set aside during the school day.

The question before the Court, however, is whether this approach—which flatly rejects the intensely felt desire of some to be allowed an opportunity for a brief formal moment of devotion within the school day—is the *only* constitutional approach. The legislatures of twenty-four states have concluded that the practice at issue here, a moment of silence for the purpose of silent meditation, provides an alternative that meets the concerns about genuine voluntariness and evenhandedness which animated the school prayer decisions, but that also accommodates the desire of so-minded students to pray. Our submission is that this is a valid solution—one that advances the purposes of the Religion Clauses.

The Alabama statute provides a brief period of quiet in which students can direct their attention away from the

immediate press of classroom activity without interruption, distraction, or fear of embarrassment. It creates a moment of privacy, an opportunity for either religious or nonreligious introspection (in the language of the statute, either "prayer" or "meditation") in a setting where, as experience has shown, many desire it. It is a means for accommodating the religious and meditative needs of students without in any way diminishing the school's own neutrality or secular atmosphere. Indeed, for persons who believe that prayer must be an integral part of all of life's activities (including school), it may make the difference between being able, in good conscience, to attend a secular public school and being forced to seek an explicitly religious alternative education.

Silence operates in a perfectly tolerant, neutral, and libertarian manner. What is done within it remains a mystery. Each boy or girl may meditate or pray; but no one can know who prays or how he does it; and each is equally free to think about yesterday's football game or tonight's date and no one will be the wiser. Silence thus accommodates those who wish to engage in the "free exercise" of prayer even during school hours, but does so without coercing or disturbing any other person. The moment of silence is an instrument of toleration and pluralism, not of coercion or indoctrination.

A moment of silence is, after all, just that: a brief period of quiet, during which students are asked to do but one thing—to be still, alone with their thoughts. By requiring a moment of silence, then, the teacher does nothing more coercive than to reaffirm this simple truth: silent reflection—no less than listening, reading, and talking—is important to education and learning. Introspection, whether religious or nonreligious, is part of the life of the mind. That is why Wordsworth called silence a "daily teacher" and Keats thought truth a "foster-child of silence."

### A. Like the Released Time Program in *Zorach* v. *Clauson*, Alabama's Moment of Silence Statute is a Permissible Government Accommodation of Religious Exercise; the Opportunity It Provides for Religious Exercise is Purely Voluntary, is Neutral Among Religions and Between Religion and Nonreligion, and Occasions No Interference by the State In Church Affairs

The fundamental impulse that led to the adoption of the Religious Clauses of the First Amendment was the desire to give free scope to religious practice without the interference that governmental prohibitions or establishments would necessarily entail. The end is toleration and accommodation, not the removal of all traces of religion from our public life. See generally *Lynch* v. *Donnelly*, No. 82-1256 (Mar. 5, 1984), slip op. 4-9. That is why this Court has repeatedly recognized that governments may expand opportunities for voluntary religious exercise, and may—indeed, sometimes must—ease burdens caused by facially neutral public or private practices that make it difficult for individuals to observe their faith.[7] See *McDaniel* v. *Paty*, 435 U.S. 618, 639 (1978) (Brennan, J., concurring); Br. for the United States as Amicus Curiae in *Estate of Thornton* v. *Caldor, Inc.*, *supra*, at

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[7] The Framers of the Bill of Rights were well aware of the concept of nonmandatory religious accommodation by the government. For example, during debate on adoption of the Second Amendment, the First Congress considered language that would have provided that "no person religiously scrupulous of bearing arms shall be compelled to render military service in person." 1 Annals of Cong. 434 (J. Gales ed. 1789). The language was deleted, in large part because, as Egbert Benson of New York put it, "[n]o man can claim this indulgence of right. It * * * ought to be left to the discretion of the Government." *Id.* at 750. This incident strongly supports the view that the Congress and the legislatures of the various states have discretion to undertake action to facilitate religious scruple. See also C. Antieau, A. Downey & E. Roberts, *Freedom From Federal Establishment: Formation and Early History of the First Amendment Religion Clauses* 62-91 (1964) (describing numerous early examples of governmental cooperation with religion).

15-17.[8] The moment of silence is an example of a permissible accommodation of religion. Through it the State —without itself sponsoring or endorsing religion—provides an opportunity for purely voluntary private devotion in the context of a highly structured, compulsory state institution where such opportunities would otherwise be nonexistent or extremely limited.[9]

The constitutionality of the moment of silence is most powerfully supported by this Court's holding in *Zorach* v. *Clauson*, 343 U.S. 306 (1952).[10] There, the school authorities faced the question of how best to deal with the "religious needs" (*id.* at 315) of some students for religious instruction or devotion. A prior decision, *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203 (1948), had held that public schools could not invite religious instructors into the school for purposes of religious instruction. Nonetheless, apprehending the need to "respect[] the religious nature of our people and accommodate[] the public service to their spiritual needs" (343 U.S. at 314), the school district in *Zorach* decided to permit students, with the permission of their parents,

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[8] A copy of that brief has been provided to the parties in this case.

[9] It is particularly appropriate for the state to provide an opportunity for voluntary religious exercise in circumstances such as military service, prisons, or compulsory schooling, where the state has itself created a regimented environment that would—in the absence of governmental accommodations—tend to inhibit religious exercise. See *Marsh* v. *Chambers*, No. 82-23 (July 2, 1983) slip op. 17-18 (Brennan, J., dissenting).

[10] The continued authority and vitality of *Zorach* is not in doubt. Although decided by a closely divided Court (three Justices dissenting), *Zorach* has become one of the leading cases on the principle that the Religion Clauses permit certain accommodations for religious practice. It has been cited approvingly by both majority and dissenters in recent Establishment Clause cases. See, *e.g.*, *Lynch* v. *Donnelly*, No. 82-1256 (Mar. 5, 1984), slip op. 4, 5, 8, 12 (majority opinion); slip op. 21-22 (Brennan, J., dissenting); *Marsh* v. *Chambers*, No. 82-83 (July 5, 1983), slip op. 9 (majority opinion); slip op. 1 n.1, 17-18 n.29 (Brennan, J., dissenting).

to leave the school grounds and go to religious centers for religious instruction.

This Court held that the released time program in *Zorach* was constitutional. It observed that "[w]hen the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions" (343 U.S. at 313-314). The Court reasoned (*id.* at 313) that there are many circumstances in which public school students need special provision to enable them to exercise their religion. Examples given were Roman Catholic mass during school hours on a Holy Day of Obligation, Jewish observances on Yom Kippur, and Protestant attendance at a family baptismal ceremeny. The need for regular religious instruction and devotion, the Court found, is not different. Whether religious accommodation is made "occasionally for a few students, regularly for one, or pursuant to a systematized program designed to further the religious needs of all the students does not alter the character of the act." *Ibid.*

The moment of silence is an equally appropriate response to the religious needs of many students.[11] By providing a brief opportunity for contemplative activity at the beginning of the school day, the government does not itself engage in or sponsor a religious activity; silence is spiritually and ideologically neutral. All the government

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[11] It might be argued that the moment of silence is more like the on-premises released time program invalidated in *McCollum* than the off-premises program approved in *Zorach*, simply because the opportunity for religious practice here takes places physically on the public school premises. However, the constitutional flaw in the *McCollum* program was that "the classrooms were used for religious instruction and the force of the public school was used to promote that instruction." *Zorach*, 343 U.S. at 315. Since the moment of silence is not in and of itself a religious activity (but only a moment of privacy in which a student may, if he chooses, engage in a religious activity), it does not create the concerns generated by the *McCollum* program. The classroom is not used for religious instruction or overt religious observance; thus the force of the school is in no way used to promote prayer.

does is to create an opportunity that the students may use, if they wish, for prayer—or for meditation or other quiet contemplation if they prefer. Nothing is asked of a student who wishes not to pray or meditate but that he remain silent, respecting the rights of his fellow students whose views may be different. No one can even know what the other chooses to do.

As was the case in *Zorach*, then, the moment of silence puts religion on a wholly voluntary basis; it simply expands the freedom available to individuals to decide for themselves whether and how to engage in religious practice, without inducing or coercing that choice. The student "is left to his own desires as to * * * his religious devotions, if any." *Zorach*, 343 U.S. at 311.

Further, the moment of silence is perfectly neutral with respect to religious practice:[12] it neither favors one religion over another, nor conveys "endorsement or disapproval of religion." *Lynch* v. *Donnelly*, slip op. 1 (O'Connor, J., concurring); see also *Gaines* v. *Anderson*, 421 F. Supp at 343-344. It thus more than satisfies *Zorach*'s requirement that religious accommodations be "neutral when it comes to competition between sects" (343 U.S. at 314).[13] All major religious faiths recognize

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[12] Of course, a perfect neutrality is not required of efforts to accommodate voluntary religious exercise. In keeping with the special status of religion under the Free Exercise Clause, the government may seek to accommodate or protect religiously-motivated claims of conscience even where it does not accord the same treatment to other strongly-held beliefs. *Marsh* v. *Chambers*, slip op. 17-18 (Brennan, J., dissenting); see, *e.g.*, *Thomas* v. *Review Board*, 450 U.S. 707 (1981); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Gillette* v. *United States*, 401 U.S. 437 (1971).

[13] The practice of providing a moment of silence at the outset of the school day seems substantially less problematic than the released time program upheld in *Zorach*. The *Zorach* program was directed exclusively to the accommodation of specifically religious needs, and only religious students could take advantage of it. Moments of silence, in contrast, are wholly neutral as between religious and nonreligious needs. As the langauge of the statute itself demonstrates, silence makes possible not only religious but

silent prayer as an acceptable form of prayer. C. Whittier, *Silent Prayer and Meditation in World Religions* 7 (Congressional Research Service May 27, 1982).[14] Whatever one's faith, a moment of silence offers an opportunity for personal devotion; yet it is offensive to no one. A better example of "accommodation of all faiths * * * and hostility toward none" (*Lynch* v. *Donnelly*, slip op. 8) would be difficult to find.[15]

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nonreligious contemplation—both "prayer" and "meditation." And by the very nature of silence, the mind can be directed to wholly nontranscendental matters as well—to anything from God to homework to the girl or boy next door. See *Gaines* v. *Anderson*, 421 F. Supp. at 342-343. Thus in no way do moment of silence statutes "confer any imprimatur of state approval of religious sects or practices." *Widmar* v. *Vincent*, 454 U.S. 263, 274 (1981).

[14] The Alabama statute requires no gesture or posture that might limit the usefulness of the moment of silence to adherents of some religions. Cf. *May* v. *Cooperman*, 572 F. Supp. at 1571-1572. The district court in *May* found as a fact that the moment of silence instituted under New Jersey law is unsuitable for prayer by persons of some religious faith (*ibid.*), but provided no examples of religions that do not consider silent prayer as at least *one* acceptable mode. But even assuming that there are such, the court's further conclusion that the moment of silence "prevents others from engaging in 'their form of prayer" (*id.* at 1575) is patently untrue. Adherents of such faiths, like those of no faith at all, remain free to meditate on secular subjects. Their religious liberty, even if not enhanced by the moment of silence, is in no way diminished.

[15] Pluralism in a different sense would also be encouraged by holding that the states *may* provide for a moment of silence. There is no need for nationwide uniformity on the moment of silence. As the district court observed in *May* v. *Cooperman*, 572 F. Supp. at 1568, attitudes toward such an exercise vary markedly from state to state and even from community to community. Experience has shown that in some communities, the moment of silence is widely accepted and useful in promoting its purposes (see, *e.g.*, *id.* at 1566-1567 (Sayreville, New Jersey)); in others, it has led to some resistance (see, *e.g.*, *id.* at 1566-1567 (Princeton, New Jersey)). The Alabama statute (unlike some other state statutes) permits the individual teacher to make the decision whether to conduct the moment of silence, thus enabling teachers to adapt to the par-

To be sure, the moment of silence implicitly presupposes, and thus affirms, the appropriateness of individual contemplative activity in an educational setting; and the Alabama statute (unlike some of the other state statutes [16]) leaves no doubt that religious contemplation is as legitimate as other forms of meditation. But in *Zorach*, the Court rejected the argument that to create an opportunity for religious practice impermissibly throws "the weight and influence of the school • • • behind a program for religious instruction" (343 U.S. at 309). The distinction is between toleration and accommodation on the one hand, and sponsorship and establishment on the other. The moment of silence "endorses" only the view that the religious observances of others should be tolerated and, where possible, accommodated. *Lynch* v. *Donnelly*, slip op. 4.

Finally, the moment of silence occasions no intrusion whatever by the state into church affairs or vice versa (cf. *Lemon* v. *Kurtzman*, 403 U.S. 602, 614 (1971)), and thus entails no interference with "the essential autonomy of religious life" (*Marsh* v. *Chambers*, No. 82-23 (July 5, 1983), slip op. 9 (Brennan, J., dissenting)). In *Zorach*, the released time program required the school district to decide what "religious centers" would qualify for participation, and involved the school in receiving

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ticular needs of the class. See NYU Note App. at 407-408 (classifying state statutes according to whether the moment of silence is required for all classrooms, or if not, whether the discretion is vested in the teacher, the principal, or the school board).

[16] Some state moment of silence statutes include the word "prayer"; some do not. See NYU Note App. at 407-408. We do not believe the presence or absence of the word is constitutionally significant. Compare *Gaines* v. *Anderson*, *supra* (upholding moment of silence statute containing the word "prayer") with *May* v. *Cooperman*, *supra* (striking down moment of silence statute contaning no reference to "prayer" or any other form of religious activity). A statute mentioning prayer as the *only* use of the moment of silence or purporting to prohibit non-religious uses of the time would, of course, present a different question.

written authorizations from parents and weekly attendance reports from churches (343 U.S. at 308). The Court did not find these contacts between governmental and religious authorities to be excessive. Here, not even such minimal contacts exist. Schoolteachers simply decide whether or not to have a moment of silence; there is no interaction with religious authorities and no need for inquiry into religious issues.

### B. In Applying the Three-Part Test of *Lemon* v. *Kurtzman*, the Court of Appeals Failed to Distinguish Between Government Efforts to Sponsor Religion and Government Accommodations of the Voluntary Exercise of Religion

The court of appeals devoted little attention in its opinion to the moment of silence provision. All but one paragraph of its 20-page opinion (J.S. App. 18a) dealt with the issues raised by the recitation of spoken prayers (as to which this Court summarily affirmed). We suspect that the moment of silence issue—one of first impression for that court, as it is for this Court—was simply engulfed in the wider waters of the case.

The court of appeals concluded that the moment of silence statute does not satisfy the "purpose" and "effect" prongs of the test set forth in *Lemon* v. *Kurtzman*, *supra*.[17] However, the court's cursory analysis was fundamentally flawed, because the court did not distinguish between government efforts to sponsor (or "establish") a religion and government efforts to accommodate the practice of religion.

1. *Purpose.* Relying on a preliminary finding by the district court on a motion for a preliminary injunction,[18]

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[17] The court made no findings under the "entanglement" prong of the test.

[18] The district court's finding, in turn, was predicated on a single statement by a legislator "that his purpose in sponsoring § 16-1-20.1 was to return voluntary prayer to the public schools. He intended to provide children the opportunity of sharing in their [*sic*]

the court of appeals stated that "[t]he objective of the meditation or prayer statute (Ala. Code § 16-1-20.1) was also the advancement of religion" (J.S. App. 18a). The existence of "this fact" and the "inclusion of prayer [in the text of the statute]" led the court to conclude that the statute "involves the state in religious activities" and demonstrated to the court that there was "a lack of secular legislative purpose on the part of the Alabama Legislature" (*ibid.*).

This reasoning cannot withstand analysis. The principal purpose of the moment of silence statute is not hidden or difficult to discover: it is to create an opportunity for school children at the beginning of the school day to engage in brief silent prayer or meditation. The court concluded that the "purpose" of this was the "advancement of religion." But this is so only in the sense that *any* attempt to facilitate the free exercise of religion "advances" religion. Yet this Court has on numerous occasions considered the legitimacy of government efforts to accommodate religion, and has repeatedly upheld accommodation as a legitimate purpose—even finding, on occasion, that accommodation is constitutionally required. *Lynch* v. *Donnelly*, slip op. 4. See, *e.g.*, *Thomas* v. *Review Board*, *supra*; *Gillette* v. *United States*, 401 U.S. 437 (1971); *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *Zorach* v. *Clauson*, *supra*; cf. *United States* v. *Lee*, 455 U.S. 252 (1982); *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977).

A government practice of accommodating religious needs also makes an important point about toleration and pluralism. The moment of silence thus serves the wholesome purpose of "fostering harmony and tolerance among the pupils." *Schempp*, 374 U.S. at 280 (Brennan, J., concurring). Ours is a nation of great religious diversity.

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spiritual heritage of Alabama and of this country" (J.S. App. 71d). The district court made no findings regarding legislative purpose in its final decision.

Schoolchildren may reveal their religious background—or lack of it—in the clothing they wear, the food they eat, or the words they utter; religious differences are not likely to be overlooked. Harmony requires, therefore, that we develop habits of mutual respect and toleration for the religious practices of others. The moment of silence provides an opportunity for young people to learn that each individual is free to worship and believe (or not believe) according to the dictates of his own conscience, and that the religious practices of others do not threaten or interfere with their own. The moment of silence is uniquely suited to such a lesson in toleration because of its dual nature—as an opportunity for exercise of faith among those who believe, and a wholly secular occasion for those who do not.[19]

The court of appeals' conclusions about the purpose of the moment of silence statute were based largely on casually phrased testimony in the district court by the provision's sponsor[20] that his purpose was "to return voluntary prayer to the public schools" (J.S. App. 71d). This statement, viewed in the context of the actual bill he introduced, can most plausibly be read as referring to voluntary *silent* prayer. And since the bill also made provision for silent meditation, it seems clear that he hoped to facilitate voluntary silent prayer in a neutral and (we submit) constitutionally unobjectionable manner. That some legislators may have harbored the hope that students would in fact use the opportunity provided for religious ends is not significant, so long as the means chosen by the legislature is found to be within the bounds of permissible accommodation. See *Mueller* v. *Allen*, No. 82-195

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[19] Some states and school administrators have also concluded that a moment of silence is an appropriate way to prepare the children for the serious work of the day, apart from considerations of religious accommodation.

[20] This testimony is not a part of the legislative history of the bill and cannot be considered an authoritative guide to its interpretation under Alabama law. *James* v. *Todd*, 267 Ala. 495, 506, 103 So.2d 19, 28-29 (1957).

(June 29, 1983), slip op. 6; *United States* v. *O'Brien*, 391 U.S. 367, 383 (1968).

Nor should the apparent hostility of some of Alabama's legislators to this Court's decisions in *Schempp* and *Engel* be considered fatal to the constitutionality of the moment of silence. Government officials are required to comply with judicial decisions, not to speak well of them. The moment of silence statute need not be viewed as a "guise" for evading this Court's decisions (J.S. App. 18a); it can more fairly be understood as an attempt—even if a grudging attempt—to comply with them. See *Gaines* v. *Anderson*, 421 F. Supp. at 341.[21]

2. *Effect.* The court of appeals' application of the "effect" aspect of the *Lemon* test is so conclusory as to make it difficult to analyze; however, it appears to mirror that court's "secular purpose" analysis. The court's "hold-[ing]" that "the state cannot participate in the advancement of religious activities" fails to distinguish between state actions that "advance" religion by coercing, sponsoring, or inducing it, and those that "advance" religion merely by removing obstacles or creating opportunities for its exercise. This profound distinction between en-

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[21] It is neither unusual nor suspicious that legislatures should pursue their policies by other means when one approach has been invalidated by the courts. See, *e.g.*, *Wolman* v. *Walter*, 433 U.S. 229, 233 (1977) (footnote omitted) ("Section 3317.06 [Ohio Rev. Code Ann. (Supp. 1976)] was enacted after this Court's May 1975 decision in *Meek* v. *Pittenger*, *supra*, and obviously is an attempt to conform to the teachings of that decision."); *Bellotti* v. *Baird*, 443 U.S. 622, 625 (1979) (after *Roe* v. *Wade*, 410 U.S. 113 (1973), state legislature passed a statute "intended to regulate abortions 'within present constitutional limits' "). Under most circumstances, the state may not merely reenact the same statute with a bowdlerized legislative history purporting to establish a legitimate public purpose (cf. *Palmer* v. *Thompson*, 403 U.S. 217, 225 (1971)); however, where the state adopts a provision that is substantively distinguishable from the prior legislation (as a moment of silence is from the prior school prayer and Bible reading exercises), the new provision should be considered on its own merits and not deemed unconstitutional simply because it was passed as a substitute for invalidated legislation.

dorsing a particular point of view and creating a neutral forum for expressive activity is at the heart of First Amendment law (see *Widmar* v. *Vincent*, 454 U.S. 263, 273 (1981), and can be ignored only at the cost of stifling the exercise of First Amendment rights.

3. In sum, the court of appeals' application of the *Lemon* test would result in invalidating *all* government actions that have the purpose or effect of facilitating or accommodating religious observance. It creates a tension with this Court's many decisions upholding, and in some cases requiring, religious accommodations—and with the Free Exercise Clause itself. For "the Constitution • • • affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch* v. *Donnelly*, slip op. 4. We have recently noted in this Court [22] the problematic nature of using the purpose and effect tests of *Lemon* in the context of determining the legitimacy of practices that seek to accommodate voluntary religious exercise. In any event, those tests should, in light of this Court's religious accommodation decisions, be interpreted in a maner that affirms that the *purpose* of religious accommodation is constitutionally legitimate, and that the *effect* of such accommodation, if appropriately neutral and voluntary, is no less so.

### C. Other Objections Raised to the Moment of Silence Are Not of Constitutional Dimension

Certain other objections have been raised by courts and commentators to observing a moment of silence in the public schools. Although not relied on by the court below, several of these warrant brief discussion.

1. The moment of silence is alleged to be unnecessary: "inasmuch as every student always retains the right to pray silently whenever the student so chooses, the meditation or prayer statute is not necessary to 'accommodate' that right." Br. of American Civil Liberties Union as

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[22] See Br. for the United States as Amicus Curiae in *Estate of Thornton* v. *Caldor, Inc.*, *supra*, at 24-29.

Amici Curiae in Support of Appellee's Motion to Dismiss or Affirm at 11; see also Harvard Note at 1885.

As far as it goes, this observation is true: silent prayer can occur without a formal moment of silence. (We recall the jest that children will continue to pray in school as long as there are algebra tests.) Necessity, however, is not the standard. Approximately half of the states have judged it appropriate to accommodate the religious needs of schoolchildren by providing an opportunity to pray during a formal moment of silence. Their reasons for doing so are substantial and should not be casually disparaged.

The principal advantage of the moment of silence is that it produces silence. Schoolchildren may be *able* to meditate or pray during the hustle-bustle of lunch, or on the playground, or during a lull in classroom activity. But surely all contemplative activity, including prayer, is enhanced if outside distractions are momentarily stilled.

The liberating aspect of the moment of silence also should not be overlooked. Many people, even religious people, especially children, find it somewhat embarrassing to be caught in the act of prayer. A student who wanders off by himself on the playground in order to offer up a brief prayer, or who lapses into a reverent silence at the lunch table, might well be the brunt of jokes and intimidation. If all are silent, then all are free to pray or meditate as they choose, without having to appear "different." Cf. *Schempp*, 374 U.S. at 208 n.3.

In any event, most forms of religious accommodation are subject to the objection that they are "unnecessary." The students involved in *Zorach* could have found time in the evening or at dawn to engage in religious instruction, without benefit of the released time program; the employees of church-operated schools in *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772 (1981) could probably afford to pay unemployment taxes (cf. *United States* v. *Lee*, *supra*); there is no indication that parents in *Mueller* v. *Allen*, *supra*, could not send their children to religious schools without tax deductions.

How serious is the need for a particular religious accommodation (where not required by the Free Exercise Clause) is primarily a question of public policy, for legislatures to assess. See *United States* v. *Lee*, 455 U.S. at 259-261; *Zorach* v. *Clauson*, 343 U.S. at 310, 314.[23] The Religion Clauses do not restrict religious accommodation to cases where the exercise of religion without the accommodation becomes impossible; their purpose is to *facilitate* the free and voluntary exercise of religion, not to restrict it to an inhospitable and grudging minimum.

2. A more substantial objection is that the moment of silence might be administered in an unconstitutional manner. A teacher might, for example, preface the moment of silence with an explanation that would tend to indoctrinate or induce students to use the time for prayer. *Beck* v. *McElrath*, 548 F. Supp. at 1165. Another teacher might insist upon a bowing of the head or a folding of the hands, gestures that convey a specifically religious symbolism. *May* v. *Cooperman*, 572 F. Supp. at 1567, 1571.

These speculations, however, are not pertinent to this case, which raises solely a challenge to the constitutionality of Alabama's moment of silence law on its face. Because implementation of the statute has been enjoined since shortly after its passage, there is no record of how the moment of silence would be administered.

With certain exceptions not relevant here, a law must be sustained on a facial challenge so long as there are nontrivial examples of permissible application. It cannot be struck down merely because some applications of it might be unconstitutional. See *Kleppe* v. *New Mexico*, 426 U.S. 529, 546 (1976); *Zorach*, 343 U.S. at 311 & n.7. If some teachers or school districts abuse the moment of silence, a challenge can be brought in that concrete factual context. See *New York* v. *Ferber*, 458 U.S. 747, 767-768 (1982); *United States* v. *Raines*, 362 U.S. 17, 20-22 (1960).

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[23] See note 7, *supra*.

3. It is sometimes suggested that the moment of silence coerces the unwilling student into "participating" in a "State prescribed religious observance." *May* v. *Cooperman*, 572 F. Supp. at 1571; see also *Duffy* v. *Las Cruces Public Schools*, 577 F. Supp. at 1022. This is true, according to one court, even when the student is not induced to pray, because the moment of silence in itself "requires all students to assume a posture identified as the posture of prayer of certain religious groups." *May* v. *Cooperman*, 572 F. Supp. at 1571. This forces the students "to decide whether * * * [to] submit to an exercise which violated their beliefs or whether they should separate themselves from their peers." *Id.* at 1576.

This, we submit, is pure nonsense. Silence in itself is not a religious exercise in which one is forced to "participate"; it is merely a private moment, to be used as one wishes, for religious or nonreligious contemplation. As the court observed in *Gaines* v. *Anderson*, 421 F. Supp. at 345, "[i]f a student's beliefs preclude prayer in the setting of a minute of silence in a schoolroom, he may turn his mind silently toward a secular topic, or simply remain silent, without violating the statute * * * or facing the scorn or reproach of his classmates." [24]

### D. This Court Has Rejected the Absolutist Approach to the Establishment Clause That Would Require Elimination of All Religious Elements From Our Public Life

The moment of silence faces still another objection, generally unstated but no less serious: some children will actually use the opportunity to pray. No matter that

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[24] A study was performed of the moment of silence as practiced in a New Mexico school district. Based on televised observations of student reaction and structured interviews, the researchers concluded that up to 20% of the students "assumed positions which could be interpreted as having the probability of being a religious act," but that "most persons viewed the moment of silence as simply silence and not as prayer." *May* v. *Cooperman*, 572 F. Supp. at 1568 (footnote omitted).

children are equally free to meditate, or daydream, or doze; no matter that none is coerced, intimidated, or indoctrinated in any fashion. The prospect that some individuals could openly (even if silently) pray *in a public school* is inconsistent with the "absolutist approach" to the Establishment Clause (*Lynch* v. *Donnelly*, slip op. 8) that this Court has frequently confronted. The animating ideal of that approach is a pristinely secular society in which all public manifestations of religious faith and practice are deemed *inappropriate*; where religion, if it is to be practiced at all, is relegated to the purely private sphere of home and church. That approach demands not neutrality and pluralism but a rigorous extirpation of religious elements from public occasions, no matter how minor, traditional, evenhanded, noncoercive, or inoffensive they may be. See, *e.g.*, *Lynch* v. *Donnelly*, *supra*; *Marsh* v. *Chambers*, *supra*; *Widmar* v. *Vincent*, *supra*; *O'Hair* v. *Andrus*, 613 F.2d 931 (D.C. Cir. 1979). It exemplifies an attitude "partak[ing] not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious." *Schempp*, 374 U.S. at 306 (Goldberg, J., concurring).

This Court, however, has consistently affirmed constitutional ideals that "rest on and encourage *diversity* and *pluralism* in all areas" (*Lynch* v. *Donnelly*, slip op. 8 (emphasis added)), and that give due respect to religious observances that have "become part of the fabric of our society" (*Marsh* v. *Chambers*, slip op. 9). See also *Lynch* v. *Donnelly*, slip op. 5-8. It has repeatedly rejected, both explicity and implicitly, the notion "that the Establishment Clause of the First Amendment not only mandates religious neutrality on the part of government but also requires that this Court go further and throw its weight on the side of those who believe that our society as a whole should be a purely secular one." *Meek* v. *Pittenger*, 421 U.S. 349, 395 (1975) (Rehnquist, J.,

dissenting). From the famous dictum that "[w]e are a religious people whose institutions presuppose a Supreme Being" (*Zorach* v. *Clauson*, 343 U.S. at 313) to the recent affirmation of the "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life" (*Lynch* v. *Donnelly*, slip op. 5), this Court has resisted efforts to use "[t]he Establishment Clause * * * as a sword to justify repression of religion or its adherents from any aspect of public life." *McDaniel* v. *Paty*, 435 U.S. at 641 (Brennan, J., concurring) (footnote omitted).

It is true that religious practice makes some people uncomfortable: "there are those who profess no religion and to whom any form of prayer is offensive" (*May* v. *Cooperman*, 572 F. Supp. at 1575). But the Constitution does not protect against the observance *by others* of religious beliefs with which we disagree. Cf. *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940). And we have no right to demand that *their* thoughts and words, because they are religious in nature, should be excluded from schools or other public places (*Widmar* v. *Vincent*, *supra*), placed under special burdens or inhibitions (*McDaniel* v. *Paty*, *supra*), or denied the benefit of the government's acknowledged power to encourage and give free rein to voluntary First Amendment activity (*Heffron* v. *International Society for Krishna Consciousness*, 452 U.S. 640 (1981)). The Establishment Clause does not require students to shed their religious beliefs and practices at the schoolhouse gate for fear of offending their fellows. Cf. *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969).[25]

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[25] Some courts seem to be moved by a nervous overestimation of the seductive and coercive power of religious expression—an attitude which stands in striking contrast to the view frequently expressed in other contexts that our people do not need to be shielded from uninhibited and robust expression. Compare *Brandon* v. *Board of Education*, 635 F.2d 971, 973 (2d Cir. 1980), cert. denied, 454 U.S. 1123 (1981) (voluntary student religious group may not meet on school grounds before school; impressionable

The special character of the public school classroom justifiably makes us especially sensitive to possible Establishment Clause problems in that setting. But we should be sensitive to the need for toleration and accommodation in the schoolhouse as well as to the need for voluntarism and neutrality. We should nurture and encourage efforts to widen rather than narrow the liberty of religious exercise.[26]

Attendance at elementary and secondary schools is compulsory, and it constitutes a major portion of the pupils' time and activity. To those who regard prayer as intrinsic to all of their activities, the opportunity for prayer at school assumes a special importance. The values of pluralism and diversity in our public schools suffer needlessly from a reading of the Establishment Clause that destroys the possibility of accommodating, in a spirit of toleration, voluntary religious practices of the sort involved in this case.

Moment of silence statutes are libertarian in the precise spirit of the Bill of Rights. This is best illumined simply by visualizing a classroom of schoolchildren who have, pursuant to the Alabama statute, been asked to be silent for one minute to open their school day. From the viewpoint of the Constitution, has anything gone *wrong* here? All we know with certainty is that, for one minute, there has been no noise, that each child has been made to be alone with his thoughts. If a child uses this moment of

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youngsters will be vulnerable to peer pressure and to perceptions of official endorsement of religion), with *Gambino* v. *Fairfax County School Board*, 429 F. Supp. 731, 736-737 (E.D. Va. 1977); *Bayer* v. *Kinzler*, 383 F. Supp. 1164 (E.D. N.Y. 1974), aff'd, 515 F.2d 504 (2d Cir. 1975) (school authorities may not prevent student newspaper from printing articles on sexual activity and birth control; authorities' fears that official status of newspaper could lead to undue pressure or misunderstanding by students unfounded).

[26] It was precisely in the context of public schools that this Court commended efforts to encourage and cooperate with the religious needs of students as "follow[ing] the best of our traditions." *Zorach*, 343 U.S. at 314.

silence, privately, to dedicate himself to God, nothing in the spirit of the Constitution has been offended. All we have done is to accommodate those who wish to pray, and we have done so in the most neutral and noncoercive spirit possible. To hold that the moment of silence is unconstitutional is to insist that any opportunity for religious practice, even in the unspoken thoughts of schoolchildren, be extirpated from the public sphere. It is to be censorial where the Religion Clauses are libertarian; it is inconsistent with our national commitment to freedom and tolerance.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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